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DATE: June 13, 2003
TO: Richard Snapper, Personnel Director
FROM: City Attorney
SUBJECT: Applicability of the Public Records Act to Salaries of City Employees

MEMORANDUM OF LAW

BACKGROUND

The City has received a request under the Public Records Act for salaries paid to members of the Mayor's staff and the staffs of the eight other City Councilmembers, specifically how much they are paid each year. For many years, this Office has advised that the salaries of staff members are public records subject to disclosure upon a proper request.¹ This advice was based on California case law and several opinions of the California Attorney General. In April, 2003, a San Mateo County Superior Court Judge challenged the status quo by barring the release of municipal government employees' salaries finding that there is a reasonable expectation of privacy in this information. In light of that decision, this Office has reviewed recent case law and other authorities to provide an overview of issues relating to disclosure of employees' salaries and a recommendation on the particular pending request for salary information.

QUESTION PRESENTED

¹ See, City Attorney Memorandum to Ed Ryan dated January 30, 1984, Attachment "A"

Are the names and salaries of the staff members to the mayor and council required to be disclosed under the Public Records Act?

SHORT ANSWER

Probably. It is highly likely that a court would conclude that the public interest in the names and salaries of the staff members is greater than the individuals right of privacy, and that such information must be disclosed under the Public Records Act. An assessment of the public interest in nondisclosure compared to the public interest in disclosure must be made by the custodian of the records on a case by case basis.

DISCUSSION

I. California Public Records Act [CPRA]

In enacting the CPRA, the legislature declared that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state. Cal. Gov't Code § 6250. The salaries of City employees fall within the definition of a public record for purposes of the CPRA, because it is a "writing containing information relating to the conduct of the public's business prepared . . . by any state or local agency. . ." Cal. Gov't Code § 6252(e). The general policy of the CPRA favors disclosure and a refusal to disclose must be justified by the specific exceptions enumerated in the Act. Cal. Gov't Code § 6255. Reasonably segregable portions of records must be made available after deletion of any portions of the records that are exempt from disclosure. Cal. Gov't Code § 6253(a).

The CPRA contains two express exemptions from disclosure that may be applicable to a request for salary information. The first is the exemption for "personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Cal. Gov't Code § 6254(c). The second is the "balancing test" exemption which applies when "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Gov't Code § 6255. These exemptions must be construed narrowly. *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 778 (1983). As such, personnel information subject to the exemption has been construed to protect intimate details of personal and family life, not business judgments and relationships. *Braun v. City of Taft*, 154 Cal. App. 3d 332 (1984). However, there is a question of whether these exemptions even apply to salary information of government employees because an employment contract between a local agency and a public employee or official is a public record which is not subject to the provisions of section 6254 or 6255. Cal. Gov't Code § 6254.8.

In *Braun v. City of Taft*, 154 Cal. App. 3d 332 (1984), the requesting party was interested in obtaining a letter that reflected the appointment of a firefighter to the position of transit administrator, and a letter rescinding that appointment. The requestor also sought a portion of the salary card that was allegedly altered in an improper manner. The court held that the letters manifested the employee's employment contract, were business transactions and contained no personal information. Therefore, the letters were properly disclosed. However, the court noted

that disclosure of the salary card posed a more difficult question. The card contained the employee's address, birth date, social security number, job classifications, salary, credit union number, and phone number.

The court stated that, because the information on the salary card was of a more personal nature, the chance of an unwarranted invasion of privacy is greater. Further, the phone number, birth date, address, social security, and salary information were not relevant to the request and could have been redacted. *Id.* at 344. Nonetheless, the court stated that "a salary classification" is public information under California Government Code section 6254.8, and that the trial court was within its discretion in finding that the disclosure of the salary card would not constitute an unwarranted invasion of personal privacy. *Id.* at 344-45.

The California Attorney General has consistently opined that public employees have a substantially diminished right of privacy in their salary information, and that requests for earnings records of individual public employees are subject to mandatory disclosure under the CPRA. 68 Op. Cal. Att'y Gen. 73 (1985). Even the names of and amounts received by county and state retirees have been subject to disclosure under the CPRA. 60 Op. Cal. Att'y Gen. 110, 113 (1977); 25 Op. Cal. Att'y Gen. 90, 91 (1955).

II. Freedom of Information Act [FOIA]

Because the CPRA was modeled after the FOIA, the FOIA may be used to construe the CPRA. *American Civil Liberties Union Foundation v. Deukmejian*, 32 Cal. 3d 440, 447 (1982). The FOIA contains an exemption for personnel files, 5 U.S.C. § 552(b)(6), which uses similar language to that of section 6254(c) of the CPRA. The federal cases interpreting this section treat salary information of public officials as personal information requiring a balancing test before disclosure is permitted.

When federal employees and officials are in a position to affect public policy, the courts have ruled that salary information should be disclosed, because the state's interest in avoiding graft and corruption outweighs the employee's privacy interest in his or her financial matters. Federal cases have upheld disclosure of individual salary information for legislators (*Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978); judges (*Duplantier v. U.S.*, 606 F.2d 654 (5th Cir. 1979); and police officers (*O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976). In the case of lower level employees, the federal cases have generally found that their salary information is personal and not subject to disclosure unless a legitimate public interest in the information has been created because the employee is involved in illegal or corrupt activities. *Columbia Packing Co., Inc. v. U.S. Department of Agriculture*, 417 F. Supp. 651, 655 (1st Cir. 1976); *Campbell v. United States Civil Service Commission*, 539 F.2d 58, 62 (10th Cir. 1976). However, the court found that 5 U.S.C. § 552(b)(6) did not apply to the disclosure of names of people entering into contracts with the federal government, stating that "Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships." *Sims v. Central Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1980).

III. Recent Court Decisions

In February 2003, the Palo Alto Daily News sent Public Records Act requests to 16 cities, asking specifically for names, titles, and wages of all city employees for the calendar year 2002. The lump-sum compensation figure included regular hours, overtime, and bonuses. Soon thereafter, a lawsuit was brought by the Teamsters and two chapters of the American Federation of State, County, and Municipal Employees to prevent the disclosure of this information relating to city employees in Atherton, Burlingame, Foster City, San Carlos, and Belmont. In April 2003, a lower court in San Mateo County issued a preliminary injunction prohibiting the release of the employee compensation information to the Palo Alto Daily News. The judge found that the employees had a reasonable expectation of privacy based on the confidentiality policies of the city, and that the newspaper had failed to articulate or show the public interest in the disclosure of information linked to individuals.

This decision created some controversy, especially in light of several opinions by the California Attorney General and a recent decision by a trial court in Kern County which reached the opposite conclusion. The Kern County case involved a request by the Bakersfield Californian newspaper to the City of Bakersfield and Kern County for the names of the individual firefighters that collected excessive overtime payments. Kern County provided salaries and overtime totals but not the identities of the people who collected them, saying that it would violate their right to privacy and expose the county to lawsuits by employees. The newspaper argued that the public has a right to know where tax dollars are being used and wanted to assess the size and appropriateness of large amounts of overtime pay to firefighters. On December 4, 2002, the trial court ordered the disclosure of the information. On January 31, 2003, the county's petition for a writ of mandate and request for a stay was denied by the Court of Appeal. On March 25, 2003, the county's petition for review was denied by the Supreme Court.

Neither of these cases resulted in a published opinion which can be relied upon as authority by other courts. As such, the leading case of *Braun* and opinions of the Attorney General must be used in analyzing this situation.

IV. Request for Salaries of Mayor and Council Staff

In this situation, the information sought is "the salaries paid to members of the mayor's staff and the staffs of the eight other City Council members, specifically how much they're paid per year." Arguably, the salaries are part of their employment contract with the City and the privacy and balancing test exemptions would not apply. Cal. Gov't Code § 6254.8. However, a court would likely conduct an analysis of the exemptions and apply the balancing test before reaching a conclusion. Because the salaries are of a personal nature, a court would consider whether disclosure of the names and salary information is an unwarranted invasion of privacy in light of the public's right to know about the conduct of the people's business. Although we do not know the purpose of the request, there is great public interest in how public funds are spent and in identifying possible corruption or misuse of public funds.

In a case involving this City Council and whether its discussion of the salaries of non-elected officers and employees in closed session violated the Brown Act, the court stated: Salaries and other terms of compensation constitute municipal budgetary matters of substantial public interest warranting open discussion and eventual electoral public ratification. Public visibility breeds public awareness which in turn fosters public activism politically and subtly encouraging the governmental entity to permit public participation in the discussion process. It is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds.

San Diego Union v. City Council, 146 Cal. App. 3d 947, 955 (1983).

The public's interest in salary information and how tax dollars are spent was extended to decisions of a city manager to require the disclosure of the names and amount of performance awards given to executive managers. 68 Op. Cal. Att'y Gen. 73 (1985). In light of the budgetary concerns facing the City this year, the public has an increased interest in salary amounts and other budgetary matters.

Another reason sometimes given for disclosure of public employees' salaries relates to the public's interest in avoiding graft and corruption. These cases generally have been federal cases and involved legislators and police officers rather than lower level employees. The staff members who are the subject of this request are unclassified, political appointees. As such, it appears that they are not the traditional lower level classified staff that have specific range of salaries under the civil service system. Some of the mayor and council staff positions have a high level of responsibility and arguably have the potential to influence City decisions and policy. For those staff members who do not have a high level of responsibility, the custodian of the records will need to articulate how the right to privacy outweighs the public right to have this information. For these reasons, there is a legitimate public interest in information about what public officials' staff are being paid by the City. Additionally, some information about the staff member's level of compensation is already a matter of public record, to the extent it is contained in the mayor and council budgets. Under these circumstances, a court would likely conclude that the disclosure of the salary information would not constitute an unwarranted invasion of privacy.

CONCLUSION

The majority of state and federal authorities on this subject support the disclosure of a public employee or official's name and salary information in response to a public request. Withholding this information in the instant situation would require the custodian of the records to bear the burden of proving that the privacy interest in the information outweighs the public interest in disclosing the information. Based on the authorities cited above and the circumstance of this request, our recommendation is that, upon a proper request from the public, the custodian of the records should disclose the names and salary information of the mayor and council's high level staff members. As to other staff members, the custodian of the records needs to determine

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whether the public interest served in disclosing the records exists, based upon the level of responsibility of each staff member, and be able to articulate these facts. This recommendation is limited to this specific situation and future requests for public records must be analyzed on the particular facts of such future requests.

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By

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CB:jb

ATTACHMENT

cc: Mayor and City Council
City Manager
Auditor

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